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and On Behalf of the Proposed Settlement Class*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In Re: HP Inkjet Printer Litigation

Master File No.: C053580 JF (PVT)

Judge: Hon. Jeremy Fogel
DECLARATION OF NIALL P.
McCARTHY IN SUPPORT OF
PLAINTIFFS' MOTION FOR
CONSOLIDATION OF CASES
FOR SETTLEMENT PURPOSES
AND FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT

This Document Relates To:
All Actions

Date: October 1, 2010
Time: 9:00 A.M.
Courtroom: 3, 5th Floor
Judge: Hon. Jeremy Fogel

DECLARATION OF NIALL P. MCCARTHY IN SUPPORT OF PLAINTIFFS' MOTION FOR
CONSOLIDATION OF CASES FOR SETTLEMENT PURPOSES AND FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT; Master File No.: C053590 JF (PVT)

1 I, Niall P. McCarthy, declare:

2 1. I am a partner in the law firm Cotchett, Pitre & McCarthy, Co-Lead Counsel for the
3 class action Plaintiffs in this proceeding. I make this declaration of my own personal knowledge
4 and, if called as a witness, I could and would testify competently to the matters stated below.

5 2. I am an attorney admitted to practice before all courts of the State of California, the
6 United States District Court for the Northern District of California, the United States District
7 Court for the Eastern District of California, the United States District Court for the Central District
8 of California, the United States Court of Appeals for the Ninth Circuit, the United States Supreme
9 Court, and several bankruptcy courts.

10 3. I make this declaration in support of Plaintiffs' Motion for Consolidation of Cases
11 and for Preliminary Approval of Class Action Settlement.

12 **BACKGROUND AND EXPERIENCE OF CO-LEAD COUNSEL**

13 4. I am a graduate of the University of California at Davis, and Santa Clara University
14 School of Law. Since 1992, I have practiced with Cotchett, Pitre & McCarthy ("CPM"), focusing
15 on class action litigation and consumer protection cases.

16 5. CPM is experienced in handling complex litigation, and has a long history of
17 successful class action results. In addition to this case, CPM has served as lead and/or trial
18 counsel in numerous notable federal and state consumer class actions, including: In re: Toyota
19 Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability
20 Litigation (C.D. Cal., Case No. 8:10ML2151 JVS (FMOx), MDL 2151) (current Co-Lead
21 Counsel); In re: Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation
22 (N.D. Cal., Case No. M:05-CV-01699-CRB, MDL 1699); In re Homestore Sec. Litig. (C.D. Cal.,
23 Master File No. 01-CV-11115 RSWL); California State Teachers' Retirement System v. AOL
24 Time Warner (Los Angeles Superior Court, Case No. CGC-03-422609); California State
25 Teachers' Retirement System v. Qwest Communications International Inc. (San Francisco
26 Superior Court, Case No. CV 415546); In re Natural Gas Anti-trust Cases I, II, III, IV, and V
27 (Price Indexing Cases) (San Diego Superior Court, JCCP Nos. 4221, 4224, 4226, and 4228); Old

1 Republic Litigation (San Francisco Superior Court No. 993507); In re Household Litigation (N.D.
2 Cal. Case No. C-02-1240 CW); In re AXA Wage and Hour Litigation (N.D. Cal. Case No. C-06-
3 4291 JSW); and In re Wachovia Wage and Hour Litigation (C.D. Cal., MDL No. 07-1807 DOC).

4 6. In conjunction with my work at CPM, I am also active in many educational and
5 legal groups. I am a past President of the San Mateo County Barristers, I have served as chairman
6 of the Business Litigation Section of the San Mateo County Bar Association, and am currently a
7 Vice President for the Consumer Attorneys of California. I have been an MCLE panelist on many
8 topics, including courtroom conduct, complex litigation, class actions, financial abuse,
9 fundamentals of business litigation, Business and Professions Code 17200, predatory lending, qui
10 tam actions, discovery for trial, and taking effective depositions. I have also received various
11 awards and recognitions for my work on behalf of clients.

12 7. My firm is highly experienced and well-regarded in many areas of complex
13 litigation, and is comprised of excellent attorneys and staff. Attached hereto as **Exhibit A** is a true
14 and correct copy of the Cotchett, Pitre & McCarthy current firm resume.

15 **PROCEDURAL HISTORY AND SETTLEMENT**

16 8. This settlement involves three separate yet intertwined class actions that were
17 brought with respect to HP inkjet printers: the *Ciolino*, *Rich*, and *Blennis* actions.

18 9. The *Ciolino* action claims that certain HP inkjet printers used “low on ink”
19 messaging technology to indicate that replacement of a cartridge is needed when the cartridge is
20 not empty and is capable of additional printing, and that this technology confused customers into
21 prematurely replacing their inkjet cartridges.

22 10. The *Rich* action claims that certain HP color inkjet printers used color ink in
23 addition to black ink when printing black text and images without disclosing this to consumers and
24 without providing consumers with the option of disabling this feature, that HP misrepresented
25 and/or failed to disclose the actual page yield for the products at issue (including the true basis for
26 the page yield and cost per page information provided to consumers), and that HP failed to
27 disclose its use of color ink when printing black in connection with stating its page yields.

1 11. The *Blennis* action claims that HP designed certain inkjet printers and cartridges to
2 shut down on an undisclosed expiration date, and that at this point consumers are prevented from
3 using any ink remaining in the expired cartridge and from using all of the printer's functions until
4 the expired cartridge is replaced.

5 12. The litigation of each action has been prolonged and comprehensive, allowing all
6 parties to thoroughly and intelligently assess the risks of future litigation and the benefits of a
7 negotiated compromise.

8 13. On September 6, 2005, plaintiff Nicklos Ciolino commenced an action against HP
9 in this Court that challenged the "low on ink" ("LOI") warnings deployed on several lines of HP
10 inkjet printers as misleading and deceptive based on the following claims and alleged facts and
11 practices: (1) that HP programmed "Smart Chips" or used other LOI messaging technology in its
12 inkjet printers and cartridges to indicate that replacement of a cartridge is needed when the
13 cartridge is not empty and is capable of additional printing; (2) that HP's LOI messages, gauges,
14 warnings, or indicators were deceptive and misled and confused consumers into prematurely
15 replacing their inkjet cartridges; (3) that HP's "SureSupply" program and related marketing
16 materials were deceptive and misled consumers; (4) that plaintiffs and class members were
17 deprived of the ability to use all of the ink in their HP inkjet print cartridges; and (5) that plaintiffs
18 and class members purchasing the HP inkjet printers and cartridges at issue did not get the full
19 value of what they paid for and were promised.

20 14. The operative complaint in the *Ciolino* action (the Second Amended Complaint)
21 asserts claims for alleged violations of California's Unfair Competition Law (Cal. Bus. & Prof.
22 Code § 17200 *et seq.*, "UCL"), California's False Advertising Law (Cal. Bus. & Prof. Code §
23 17500 *et seq.*), California's Consumers Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*), and
24 claims for unjust enrichment, breach of express warranty, and breach of implied warranty on
25 behalf of a nationwide class of consumers.

26 15. HP aggressively defended the lawsuit with a number of arguments, including that
27 the low-on-ink messages were straightforward and did not tell or require consumers to replace
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1 their inkjet cartridges. Rather, HP argued, the messages informed consumers that they were low-
2 on-ink, and that they should consider having a replacement cartridge available for when print
3 quality was no longer acceptable to them.

4 16. In bridging the gap toward settlement, both sides made significant but rational
5 compromises. Plaintiffs accepted that not all of the low-on-ink messages were deceptive or
6 misleading, and asserted that the most confusing of the low on ink warnings were those with
7 graphic images showing near empty cartridges. HP agreed to eliminate those warnings in a series
8 of business practice changes.

9 17. Significant damages were not appropriate or attainable in this case for several
10 reasons. First, although plaintiffs were confident they could establish that HP's "low on ink"
11 warnings were inaccurate, no warning actually and explicitly directs the consumer to "throw out
12 your cartridge," nor does the activation of the warning shut down the cartridge prematurely.
13 Moreover, it would be difficult if not impossible to determine how much ink remains in a cartridge
14 when discarded by a consumer (particularly many years after the fact). Accordingly, a case to
15 obtain individual damages would be speculative and would more than likely not succeed. Thus,
16 Plaintiffs agreed that any cash (or cash-like relief) must be a small percentage of the total
17 compensation provided to the class, and, even then, consumers seeking to take advantage of these
18 funds must demonstrate they actually relied on the warnings and reasonably believed they were
19 required to "toss out" cartridges.

20 18. Further complicating the litigation and increasing the risk substantially of
21 ultimately succeeding was this Court's decision denying nationwide class certification on July 25,
22 2008. Although that decision rested on "manageability" grounds, it did limit plaintiffs to moving
23 forward on their second attempt at class certification with a California-only state class. Moreover,
24 the court's companion decision on the same date, albeit denying HP's Motion for Summary
25 Judgment, included a discussion of plaintiffs' substantive claims that was skeptical of plaintiffs'
26 class claims and raised some doubt as to whether even a statewide class would be approved. In
27 effect, strident negotiation was the best opportunity to assure that the millions of members in the
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1 class would receive some relief.

2 19. On May 22, 2006, plaintiff Carl K. Rich commenced an action against HP in this
3 Court based on the following claims and alleged facts and practices: (1) that HP failed to disclose
4 that its color inkjet printers use color ink in addition to black ink when printing black text and
5 images (this technology is referred to as “underprinting”); (2) that HP failed to provide consumers
6 of HP color inkjet printers with the option of printing black text and images using ink from the
7 black print cartridge only; (3) that HP published and made representations regarding the page yield
8 specifications for its inkjet printers and cartridges but misrepresented and/or failed to disclose the
9 actual page yield customers would receive for the products at issue, including the true basis for the
10 page yield and cost per page information provided to consumers; and (4) that HP failed to disclose
11 its use of color ink when printing black in connection with stating its page yields for color inkjet
12 printers and cartridges, thereby increasing the actual costs of printing black text and images. The
13 operative complaint in the *Rich* action (the Second Amended Complaint) asserts claims for alleged
14 violations of the UCL, unjust enrichment, and fraudulent concealment on behalf of a nationwide
15 class of consumers.

16 20. Plaintiff Rich’s original complaint was amended twice. The First Amended
17 Complaint was filed on September 29, 2006, to add causes of action for breach of express
18 warranty and breach of the covenant of good faith and fair dealing (in addition to the claims
19 discussed above). The Second Amended Complaint was filed on January 12, 2007, following the
20 Court’s order of December 4, 2006 granting HP’s Motion to Dismiss. Based on this order,
21 plaintiffs dropped their claims for breach of contract, breach of express and implied warranty, and
22 breach of the covenant of good faith and fair dealing. The Second Amended Complaint (which
23 HP answered on February 28, 2007) also introduced an additional plaintiff and proposed class
24 representative (David Duran, a resident of California) and maintained claims based on unjust
25 enrichment, fraudulent concealment, and violations of the UCL. In the Second Amended
26 Complaint, Plaintiffs Rich and Duran allege that HP designed its color inkjet printers to use color
27 ink—in addition to the significantly less expensive black ink—when printing black and white

1 images and text, in order to force its customers to prematurely deplete their color ink cartridges
2 and therefore prematurely purchase the expensive color inkjet cartridges.

3 21. On June 23, 2009, Plaintiffs filed a motion to certify two classes—a damages class
4 consisting solely of California consumers, and a proposed nationwide class for injunctive relief
5 only. On December 7, 2009, HP filed its Opposition to Plaintiffs’ motion for class certification,
6 and simultaneously filed a Motion for Summary Judgment, where it argued, *inter alia*, that: (1)
7 plaintiffs cannot establish that HP had an affirmative duty to disclose the allegedly concealed
8 information, and each of their claims fails as a result; (2) plaintiffs cannot establish that HP caused
9 them any harm, or that the allegedly concealed information was material to their purchase
10 decisions, thus entitling HP to summary judgment on plaintiffs’ fraudulent concealment and UCL
11 claims; and (3) plaintiffs’ purported “claim” for unjust enrichment fails because it necessarily
12 depends on, and falls with, their other fraud-based claims. In light of the parties’ extensive
13 settlement discussions, neither plaintiffs’ Motion for Class Certification nor HP’s Motion for
14 Summary Judgment has been heard, and this Court took them off calendar for administrative
15 reasons on March 8, 2010, pending the parties’ settlement discussions.

16 22. As with the *Ciolino* action, in bridging the gap toward settlement of the *Rich*
17 action, both sides made significant but rational compromises. Plaintiffs accepted that
18 underprinting is a legitimate and common technology that increases print quality. HP agreed to
19 provide additional disclosures to consumers regarding the use of underprinting, its pros and cons,
20 and measures that can be used to disable it.

21 23. Moreover, as with the *Ciolino* action, significant damages were not appropriate or
22 attainable in this *Rich* matter for several reasons. First, although plaintiffs were confident they
23 could establish that underprinting caused consumers to use color ink when they would not have
24 expected to, it would be difficult if not impossible to determine how much color ink is actually
25 expended by consumers due to underprinting. Furthermore, it would be difficult to establish that
26 had consumers known about underprinting, they would have chosen to disable it, and thereby
27 sacrifice the benefit of increased print quality due to underprinting. Accordingly, a case to obtain
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1 individual damages would be speculative and would more than likely not succeed. Thus, plaintiffs
2 agreed that any cash (or cash-like relief) must be a small percentage of the total compensation
3 provided to the class.

4 24. On January 17, 2007, Plaintiffs Jackie Blennis and David Brickner commenced an
5 action against HP in this Court based on the following claims and alleged facts and practices: (1)
6 that HP designed certain of its inkjet printers and inkjet cartridges to shut down on an undisclosed
7 expiration date, at which point consumers are prevented from using the ink that remains in the
8 expired cartridge and from using all of the printer's functions (including scanning or faxing
9 documents) until the expired cartridge is replaced; (2) that HP failed to disclose and/or actively
10 concealed information regarding its use of expiration dates in certain of its inkjet printers and
11 cartridges; and (3) that HP interfered with the right of plaintiffs and the class members to possess
12 and use all of the ink in the HP print cartridges that they purchased.

13 25. The original complaint in the *Blennis* action asserts claims for alleged violations of
14 the UCL, fraudulent concealment, unjust enrichment, breach of express warranty, breach of
15 implied warranty, trespass, and conversion on behalf of a nationwide class of consumers. HP filed
16 a Motion to Dismiss the complaint. On March 25, 2008, the Court dismissed Plaintiff's claims for
17 express warranty, implied warranty, trespass to chattels and conversion. On May 8, 2008, HP
18 answered Plaintiffs' complaint. On December 8, 2009, Plaintiffs filed their Motion for Class
19 Certification, seeking to certify a class consisting of "All persons or entities in the United States
20 who own one or more models of Hewlett-Packard inkjet printers that use ink cartridges that have
21 an expiration date." In light of the parties' extensive settlement discussions, the Motion for Class
22 Certification has not yet been heard.

23 26. As with *Ciolino* and *Rich*, significant damages were not appropriate or attainable in
24 this *Blennis* matter for several reasons. First, although Plaintiffs were confident that they could
25 establish that HP employed expiration dates without properly disclosing those dates to consumers,
26 it would be difficult if not impossible to establish which consumers may have hit expiration dates
27 and how much ink, if any, may have remained in the cartridge at the time the expiration date was
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1 hit. Furthermore, HP did provide some disclosures to consumers regarding ink expiration, and HP
2 believed that it had legitimate technical reasons for employing ink expiration dates in the limited
3 number of HP printer models where such expiration dates were employed. Accordingly, a case to
4 obtain individual damages would be speculative and would more than likely not succeed. Thus, as
5 in the *Ciolino* and *Rich* actions, Plaintiffs agreed that any cash (or cash-like relief) must be a small
6 percentage of the total compensation provided to the class.

7 27. Throughout the *Ciolino*, *Rich*, and *Blennis* actions, the counsel for the parties
8 engaged in multiple informal but comprehensive settlement discussions, giving due consideration
9 to the parties' respective positions. Plaintiffs' counsel in the course of the litigations had
10 conducted an extensive investigation into the facts and law relating to the matters alleged in their
11 respective complaints. The investigation included: (1) the depositions of 17 witnesses; (2) the
12 production of more than 250,000 pages of documents; (3) more than 100 written discovery
13 requests; (4) the inspection of several of the HP Inkjet printers at issue; (5) consultations with
14 industry personnel; (6) extensive work with experts and testing by those experts; (7) numerous
15 interviews of witnesses and putative members of the classes; (8) the evaluation of information
16 provided by current or former employees of HP (including the HP engineers with primary
17 responsibility for the design of some of the HP inkjet printer models at issue and matters related
18 thereto); and (9) legal research as to the sufficiency of the claims.

19 28. As a result of the foregoing investigation, Plaintiffs and their counsel obtained
20 comprehensive knowledge of HP's printer technology which extended to all three actions, and
21 received, examined, and analyzed information, documents, printers, components, and materials
22 that they deemed necessary and appropriate to enable them to enter into a settlement on a fully
23 informed basis. Settlement was ultimately reached as a result of extensive arm's length
24 negotiations between counsel for Plaintiffs in the *Ciolino*, *Rich*, and *Blennis* actions, on the one
25 hand, and counsel for HP, on the other hand, occurring over several years and multiple mediation
26 sessions with several highly respected and nationally-recognized mediators—the Honorable
27 Daniel Weinstein of JAMS (*Ciolino*), the Honorable James L. Warren of JAMS (in the *Ciolino*

1 and *Rich* actions), and Alexander S. Polsky, Esq., of JAMS (*Blennis*).

2 29. Accordingly, the parties have entered into a Stipulation of Settlement that provides
3 class members with sufficient information to make a reasoned decision regarding the future
4 purchase of HP inkjet printers, and some monetary compensation for the alleged damages
5 sustained by the *Ciolino*, *Rich*, and *Blennis* classes, as described below. A true and correct copy
6 of the Stipulation of Settlement is attached hereto as **Exhibit B**.

7 30. As discussed above, the *Ciolino*, *Rich*, and *Blennis* actions focus on alleged
8 nondisclosure of information about certain features of, and technology used in, HP's inkjet
9 printers. The injunctive relief provided to the Settlement Class addresses the core complaint in
10 each case by requiring HP to discontinue the use of certain pop-up messaging that includes the
11 graphic image of an ink gauge, ruler, or container of ink, and by requiring HP to disclose
12 additional information regarding the HP technology that forms the basis of the *Ciolino*, *Rich*, and
13 *Blennis* actions on HP's website (a location where HP customers already obtain information about
14 and can purchase HP printer products), and in the packaging, manuals, and/or user interfaces for
15 HP inkjet printers. Class counsel believes that these disclosures achieve the primary objective of
16 the *Ciolino*, *Rich*, and *Blennis* actions.

17 31. The parties also negotiated some direct monetary relief to the class members in the
18 *Ciolino*, *Rich*, and *Blennis* actions. Given the current litigation posture of the cases, Plaintiffs and
19 their counsel believe that the compensation is eminently fair and reasonable. In settlement of
20 these three matters, HP has agreed to create a pool of up to \$5,000,000 in monetary e-credits that
21 can be used for the purchase of printers or printer supplies online at HP's website
22 (www.shopping.hp.com). The claims process is slightly different for the *Rich* class members as
23 compared with the *Ciolino* and *Blennis* class members. With respect to each printer purchased or
24 received as a gift in the *Rich* action, the class member need only provide proof of ownership (*e.g.*,
25 the serial number or other proof) in order to obtain the e-credit of up to \$2.00. No attestation or
26 further proof of injury will be required to recover an e-credit for *Rich* class members.

27 32. With respect to each printer purchased or received as a gift in the *Ciolino* action,

1 the class member must not only provide proof of ownership, but must also declare that they: (a)
 2 received a LOI Message; (b) believed that they were out of ink as a result of the LOI Message they
 3 received; and (c) removed the inkjet cartridges upon receiving the LOI Message without using the
 4 remaining ink.

5 33. Likewise, with respect to each printer purchased or received as a gift in the *Blennis*
 6 action, the class member must not only provide proof of ownership, but must also declare that they
 7 purchased an inkjet cartridge for their inkjet printer that reached the ink expiration date before the
 8 cartridge had been fully used. Given the fact that *Ciolino* class members might not have received
 9 a LOI Message, might not have believed they were out of ink as a result, or might not have
 10 removed the inkjet cartridge without using the remaining ink, and that *Blennis* class members
 11 might have fully used their inkjet cartridge before that cartridge reached the ink expiration date,
 12 Plaintiffs and their counsel believe this additional condition is fair. To ease the burden for the
 13 claims submission process, the claim form will be submitted electronically.

14 34. HP has agreed to pay for the class notice and administration (up to \$950,000), and
 15 class counsel was able to secure very comprehensive notice by utilizing the economies of scale of
 16 having the notice combined for the *Ciolino*, *Rich*, and *Blennis* actions.¹

17 35. The notice will be provided through the following means: (a) e-mail of the Long
 18 Form Notice (**Exhibit B, Attachment B**) to the last known e-mail addresses of settlement class
 19 members, to the extent such e-mail address information exists in HP's databases and the
 20 settlement class member has not withheld his/her consent to be contacted by HP via e-mail; (b)
 21

22 ¹ In addition, class counsel and HP also are negotiating a settlement of cases pending
 23 in the United States District Court for the Central District of California asserting claims
 24 that certain HP color laser printers stop printing when there is still enough toner in the
 25 cartridge to continue to print. *See Baggett v. Hewlett-Packard Co.*, C.D. Cal. Case No. SA
 26 CV 07-00667 (filed July 6, 2007, and assigned to Guilford, J.; summary judgment granted
 27 Sept. 29, 2009); *Young v. Hewlett-Packard Co.*, C.D. Cal. Case No. Case No. CV 09-
 28 00315 (filed Jan. 14, 2009, and assigned to Guilford, J.; dismissed on Mar. 16, 2010). The
 parties have arranged to coordinate the publication and e-mail notices in the inkjet
 (*Ciolino*, *Rich*, and *Blennis*) and laser (*Baggett* and *Young*) cases in order to achieve
 certain efficiencies.

1 publication notice (**Exhibit B, Attachment E**) including PARADE magazine, USA WEEKEND,
 2 PEOPLE and CIO magazine; and (c) online “banner” advertisements on YAHOO.COM and other
 3 websites through 24/7 REAL MEDIA NETWORK. Plaintiffs, class counsel, and the notice expert that
 4 we have retained anticipate that this notice will reach approximately 75% of class members based
 5 on conservative estimates.

6 36. In addition, HP has agreed, subject to Court approval, to pay a stipend not to
 7 exceed \$1,000 to each named Plaintiff in the *Ciolino*, *Rich*, and *Blennis* actions. HP has also
 8 agreed, subject to the Court’s approval, to separately pay to Plaintiffs’ counsel’s attorneys’ fees,
 9 costs, and expenses in an amount not to exceed \$2,900,000. The payment will be in lieu of
 10 statutory fees that Plaintiffs and/or their attorneys might otherwise be entitled to recover on their
 11 claims, including claims for injunctive relief, and this amount is inclusive of all fees and costs of
 12 class counsel in the *Ciolino*, *Rich*, and *Blennis* actions. We negotiated attorneys’ fees with
 13 counsel for HP only after the class benefit was negotiated. The agreed-upon fee represents only a
 14 fraction of the lodestar hours actually worked on the *Ciolino*, *Rich*, and *Blennis* actions by counsel
 15 for Plaintiffs.

16 **CONSOLIDATION**

17 37. The *Ciolino*, *Rich*, and *Blennis* actions involve overlapping products, claims,
 18 theories, and class members. For example, in each action the printer models at issue consist
 19 entirely of HP’s consumer inkjet printers, and indeed, in many instances, as demonstrated by the
 20 compilation of HP inkjet printers listed in Exhibit F to the Stipulation of Settlement, the same
 21 inkjet printer could be involved in multiple cases. Thus, a settlement class member under the
 22 Stipulation of Settlement could concurrently belong to multiple class definitions as outlined in
 23 each of the operative complaints in *Ciolino*, *Rich*, and *Blennis*, by virtue of their ownership of a
 24 single HP inkjet printer. Indeed, members of the Settlement Class are eligible to receive
 25 settlement benefits under more than one case based on a single printer purchase, and the relief
 26 provided to HP’s customers pursuant to the Stipulation of Settlement is similar for all three cases.

27 38. The consolidation of the three related HP inkjet cases also recognizes the similarity

1 of claims and theories asserted by each of the three cases. Each case asserted as its core that HP
2 violated the UCL. Coordinated resolution of the *Ciolino*, *Rich*, and *Blennis* actions is also
3 warranted by the factual claims of each of the complaints involved, which are in essence claims
4 about the quantity of output, and the amount of usable ink or value received from the HP inkjet
5 printer models and their corresponding HP inkjet cartridges.

6 39. For all of these reasons, consolidation of what are essentially three overlapping
7 classes into one settlement class is practical, reasonable, efficient, and appropriate for the purposes
8 of settlement. Consolidation also is more efficient for settlement class members. In fact, the
9 economies of scale in the comprehensive notice program would only be possible if these actions
10 are settled jointly.

11 **PRELIMINARY APPROVAL IS WARRANTED**

12 40. Settlement of these cases will benefit millions of consumers by shifting
13 longstanding embedded business practices toward the benefit of consumers. With added
14 disclosure and transparency comes a more knowledgeable consumer who will have the
15 opportunity to enjoy greater value from their inkjet printers—and ultimately save money and work
16 more efficiently. The parties have worked diligently to reach this compromise. It is reasonable
17 and provides important relief to the class.

18 41. The settlement was negotiated at arm's length by experienced counsel on both sides
19 of the table, who are fully versed in class litigation, particularly with respect to consumer class
20 action litigation and specifically technology related claims and product defect cases.
21 Substantively, the settlement provides material and valuable class wide relief, does not grant
22 preferential treatment to class representatives, and does not provide attorneys' fees at the expense
23 of the class.

24 42. Mandated in the settlement are changes in business practices that will be real and
25 substantial. Primarily, millions of consumers will enjoy enhanced disclosures explaining, and
26 making clearer, a range of critical information about the use of their inkjet printers and
27 replacement cartridges. For example this heightened disclosure regime will enable consumers to

1 better understand low on ink warnings and use those warnings to their advantage. Similarly,
2 consumers will have a better understanding of when they are using color ink in connection with
3 printing plain old black. Finally, consumers will better understand which inkjet printers and
4 cartridges are subject to ink expiration, why HP employs this technology, and how it works. This
5 is the type of injunctive relief that the *Ciolino*, *Rich*, and *Blennis* classes would have obtained only
6 if they had prevailed at trial and through appeal.

7 43. Finally, given the relative strengths of the parties' positions the direct
8 compensation portion of the settlement is fair and reasonable. Indeed, since virtually all class
9 members use HP products, the e-credit is something that can be used by virtually all class
10 members. The amounts—up to \$5.00 for each *Ciolino* printer, up to \$2.00 for each *Rich* printer,
11 and up to \$6.00 for each *Blennis* printer—are fair and reasonable, particularly when considering
12 the risks and uncertainties of further litigation and the likelihood that if the cases proceeded to
13 judgment, class members may ultimately receive nothing (no injunctive or monetary relief).

14 44. As Plaintiffs' Co-Lead counsel, based on my review of the relevant law and the
15 facts of this case, along with my significant experience in class action litigation, I feel that
16 Plaintiffs have a solid case. There are, however, several heavily disputed legal and factual issues
17 on which Plaintiffs would have to prevail in order to succeed in this case, and which justify a
18 discount of Plaintiffs' claims for purposes of settlement. In spite of this, I believe we have
19 achieved a settlement with substantial benefits in a case with a high degree of risk, and without
20 any assurance of compensation. As Co-Lead counsel, my firm alone has expended thousands of
21 hours of attorney and staff time litigating these matters over the past five years. This Settlement
22 will provide real monetary and non-monetary benefits to all Class Members.

23 45. In my opinion, the settlement reached with Defendants is fair, reasonable, and
24 adequate. I personally participated in settlement negotiations with Defendants, all of which were
25 at arm's-length. As discussed above, the parties reached settlement only after several formal
26 mediation sessions, and countless hours of contentious settlement negotiations spread over a
27 period of several years. Experienced counsel for Plaintiffs and Defendants negotiated the

1 settlement, with intermittent guidance from highly experienced mediators.

2 46. Further justifying settlement at this point is the fact that absent settlement, full
3 resolution of this action would likely still be years away, and would require significant
4 expenditure of resources by counsel, close and time-consuming management by the Court, full
5 rounds of discovery, substantial motion practice, a lengthy trial or trials, and appeals. Plaintiffs
6 and class members have already been waiting for years for resolution of their claims, and would
7 likely be waiting for several more without this settlement.

8 47. As supported by this declaration and the attached CPM resume, I and my firm have
9 the experience and resources required to more than adequately serve the interests of the class.

10 48. There are no conflicts between the interests of the Settlement Class Representative
11 Plaintiffs and the Class.

12 49. All of the procedures for providing notice to the Class of the proposed Settlement
13 terms, and affording opportunities to submit claims, object to, or opt out of the Settlement are
14 customary, fair, and adequate.

15 50. For all of the reasons contained herein, and based on the combined experience of
16 my own firm with that of my Co-Lead counsel and other class counsel, it is my opinion that this
17 Settlement is fair and reasonable, and warrants the Court's preliminary approval.

18 I declare under penalty of perjury under the laws of the United States of America that the
19 foregoing is true and correct to the best of my knowledge.

20 Executed at Burlingame, California, on August 25, 2010.

21 /s/ Niall P. McCarthy
22 Niall P. McCarthy